

ment is to make this great bureaucracy think about this hard before the gears start in motion.

So do not go let out the bids and everything and then write the statement, because once the agency is committed to the action, it is too late to write statements.

The very purpose of the law, to protect the environment in this area, is to get the statement written before the agency becomes bureaucratically committed to a course of action that could hurt the environment. And that is what was going on in that opinion.

Senator KENNEDY. Well, it is a good example of how sound environmental regulation can protect the public interest.

I would like to introduce into the record a letter, Mr. Chairman, from Douglas Foy, who is the executive director of the Conservation Law Foundation, certainly the leading public interest environmental law group in New England. Mr. Foy writes in part:

Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore.

Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

To which I can add that the first circuit's loss is the Nation's gain.

The CHAIRMAN. Without objection, it will be placed in the record.

CONSERVATION LAW FOUNDATION,  
*Boston, MA, June 30, 1994.*

TO WHOM IT MAY CONCERN: Stephen Breyer has fashioned a remarkable record on environmental matters that have come before the First Circuit Court of Appeals. His opinions reflect an unusual sensitivity to natural resource concerns, whether in matters involving air and water pollution, off-shore oil and gas drilling, the clean-up of Boston Harbor, or protection of the Cape Cod National Seashore. The Court's line of decisions on the obligations imposed by NEPA are leading precedents, reflecting a penetrating understanding of the law's requirements and of agencies' cavalier efforts to avoid its application.

Judge Breyer brings a New Englander's common sense to natural resource matters, and couples that common sense with an impressive understanding of administrative procedure and agency foibles. Much of the development of environmental law in the next decade will revolve around the application and enforcement of pivotal federal laws (such as the Clean Air Act, National Energy Act, Magnuson Act, and ISTEA), by agencies, in the states and regions. Stephen Breyer is precisely the kind of judge to whom we should entrust review of agency compliance with those laws. My only regret is that Judge Breyer cannot sit on the Supreme Court and the First Circuit at the same time.

Sincerely,

DOUGLAS I. FOY,  
*Executive Director.*

Senator KENNEDY. Turning to another area involving the criminal justice system, as you know, Senator Thurmond and I worked for many years with Chairman Biden to pass the Sentencing Reform Act of 1984, the law that abolished the Federal parole and created a sentencing guidelines system in the Federal courts. And with all the talk about truth in sentencing, it is important to remember that we created truth in sentencing at the Federal level 10 years ago.

Before that time, the sentencing system was a matter of law without order; judges in two different courtrooms sentencing two equally culpable defendants might hand down two completely different sentences. One defendant might get 10 years, another might get probation, and there was nothing the prosecutors could do about it. And because of parole, the sentence imposed by the judge had little to do with the time the defendant actually served, and many criminals served only a third of their sentences even in cases involving violent crimes.

This system led people to lose faith in the ability of the legal system to do justice and protect the interests of victims of crime. So we abolished parole in the Federal system and created a commission to write sentencing guidelines so that criminals who commit similar crimes will get similar sentences and actually serve the time they get.

You served as one of the first members of the commission. You helped forge the key agreements that got the job done. These guidelines provide for tough, no-nonsense sentences, increasing the time served by violent criminals and by white-collar corporate criminals who used to get special treatment in the Federal courts.

Could you briefly describe how the guideline system achieves truth in sentencing and why you think that truth in sentencing is an important goal.

Judge BREYER. I think that you decided, Senator, and the other Senators on this committee decided, at that time correctly, that the public was very confused about sentencing. A judge would sentence a robber to 6 years in jail, but the robber would be out after 2. Sometimes, the judge would sentence him to 18 years for a violent robbery, and he would be out after 6. Sometimes, the judge would sentence him to 8, and he would not be out until after 7. No one knew what in fact was happening, and the public's cynicism grew.

Therefore, you and this committee and the Congress decided that under the new Federal sentencing system, the sentence given by the judge would be the sentence that was served—not completely; there is 15 percent good time that could be awarded—but basically, the sentence given would be the sentence served, and that is what has happened.

The second basic objective that you had, which I think still is a worthy objective, I could describe like this: Many judges in the first circuit have a lot of experience in sentencing, and they do it well. Judge Toro, the chief judge in Massachusetts, across the hall, for many years would describe to me how he sentenced people, and it seemed very sensible. But then, a different judge in Los Angeles, let us say, an equally good judge, an outstanding judge, would sentence the same kind of person for the same kind of crime, and the results would be dramatically different.

So what you said is that the sentence should not depend on who the judge is. In New York, they would have a wheel and assign judges by lottery. Well, why would you need a wheel, unless people thought that the personality of the judge was playing a role in the sentence? Well, that should not be. And so you set up the Sentencing Commission to try to even that out. That is a hard job.

I think the Sentencing Commission has come up with guidelines that do tend to even that out. The basic philosophy of the statute,

the basic philosophy of the guidelines, is that they will write guidelines that apply to specific types of crimes and specific types of criminals, and judge, when you are sentencing a person for a particular kind of crime, a particular kind of person, you follow the guidelines. That gives you very little leeway—if you have an ordinary case. Judge, if you have an unusual case, you may depart from the guidelines. Use your own judgment there. But you have to give your reason, and it will be reviewable in a court of appeals.

Now, that is the basic theory. Guidelines, I know, are controversial. I know that these guidelines have not worked perfectly. But it does seem to me to be a step in the right direction toward more uniform justice and toward more uniform justice and toward more understandable justice so that people will understand that punishments are uniformly applied, and the punishment announced is the punishment that will be given.

Senator KENNEDY. Do you want to add anything with regard to whether the mandatory minimums have been additive and useful and helpful?

Judge BREYER. Well, what I have said publicly, Senator—

Senator KENNEDY. I was going to keep you out of controversy until that one.

Judge BREYER. This is a legislative matter. This is a legislative matter, and I think that Congress will in its wisdom determine that political matter. I have expressed in my writings sometimes some criticism of that.

Senator KENNEDY. I will include that excellent article as part of the record.

[Article follows:]